No. _____

IN THE

Supreme Court of the United States

October Term, 1994

REYNOLDSVILLE CASKET CO., *et al.*,
Petitioners,

vs.

CAROL L. HYDE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

WILLIAM E. RIEDEL
Counsel of Record
WARREN AND YOUNG
P. O. Box 278
134 West 46th Street
Ashtabula, Ohio 44004
(216) 997-6175
Attorney for Petitioners

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

74 pp

QUESTION PRESENTED FOR REVIEW

Whether state courts, in refusing to retroactively apply the decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 108 S. Ct. 2218, 100 L. Ed. 2d 896 (1988), to civil cases pending at the time *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* was announced may properly premise their actions on the following grounds:

A. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), dictates that *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* should not be retroactively applied.

B. *Harper v. Virginia Dept. of Taxation*, 509 U.S. _____, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993), allows state courts to tailor their own remedies as they determine the manner in which a United States Supreme Court opinion is to be retroactively applied.

C. When there is a conflict between a state constitutional civil right and a federal rule of decision that is not rooted in the United States Constitution, such as retroactivity, the state civil right prevails.

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INTRODUCTION

William E. Riedel, Attorney for Reynoldsville Casket Co. and John M. Blosh, petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court, entered on February 9, 1994.

OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported at 68 Ohio St. 3d 240 (1994) and is attached at Appendix p. A1.

The opinion of the Eleventh District Court of Appeals for Ashtabula County, Ohio, was entered on July 2, 1992 and is attached hereto at Appendix p. A17.

The judgment entry of the trial court was entered on July 31, 1991 and is attached hereto at Appendix p. A27.

JURISDICTIONAL STATEMENT

The opinion of the Ohio Supreme Court was entered on February 9, 1994. Petitioners' request for a rehearing was denied by the Ohio Supreme Court on April 6, 1994. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

U.S. Const. Article VI, cl. 2, provides that:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Appendix p. A36.

Ohio Const., Article I, §16, provides in part that:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

Appendix p. A36.

Ohio Revised Code §2305.10, provides in part that:

> "An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose."

Appendix p. A37.

Ohio Revised Code §2305.15, provides in part that:

> "When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought."

Appendix p. A38.

Ohio Revised Code §2305.15(a), provides in part that:

> "(A) When a cause of action accrues against a person, if he is out of the state, has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, 1302.98, and 1304.29 of the Revised Code does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, absconds, or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought."

Appendix p. A39.

STATEMENT OF THE CASE

On March 5, 1984, John M. Blosh, while driving a truck owned by his employer, the Reynoldsville Casket Co., was involved in an auto accident with another vehicle in which Carol L. Hyde was a passenger. The accident occurred in Ashtabula County, Ohio. The Reynoldsville Casket Co., a Pennsylvania corporation, had no corporate office in Ohio, was not registered to do business in Ohio and had not appointed an agent for service of process in Ohio. John M. Blosh and Carol L. Hyde were also residents of Pennsylvania.

On August 11, 1987, Carol L. Hyde filed suit against John M. Blosh and the Reynoldsville Casket Co. claiming that John M. Blosh, while in the scope of his employment with Reynoldsville Casket Co., was negligent in the operation of Reynoldsville Casket Co.'s truck, said negligence causing bodily injury to Carol L. Hyde. On October 13, 1987, John M. Blosh and the Reynoldsville Casket Co. filed their Answer. Along with denying the allegation of negligence, John M. Blosh and the Reynoldsville Casket Co. raised the affirmative defense that Carol L. Hyde's claim was time barred by Ohio's two-year statute of limitations, O.R.C. §2305.10.

On February 8, 1988, John M. Blosh and Reynoldsville Casket Co. filed a Motion to Dismiss, pursuant to Oh. Civ. R. 12(B)(6), requesting dismissal of Carol L. Hyde's Complaint in that it was time barred by the two-year statute of limitations contained in O.R.C. §2305.10. Carol L. Hyde's response to the Motion to Dismiss was to claim that O.R.C. §2305.15, generally referred to as the Savings Clause, permitted the filing of her Complaint.

While the Motion to Dismiss was pending before the trial court, the United States Supreme Court in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 108 S. Ct. 2218, 100 L. Ed. 2d 896 (1988), declared that Ohio's Savings Clause, O.R.C. §2305.15 violated the Commerce Clause of the United States Constitution since it imposed an impermissible burden on interstate commerce. In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, the Court declined to address the argument of Bendix that if the Court found O.R.C. §2305.15 unconstitutional, the Court's ruling should be prospective only and not apply to the parties in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*

On July 31, 1991, the trial court granted John M. Blosh's and Reynoldsville Casket Co.'s Motion to Dismiss. In dismissing the Complaint of Carol L. Hyde, the trial court applied the ruling in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* to both Reynoldsville Casket Co. and John Blosh. Upon appeal to the Court of Appeals, the decision of the trial court was affirmed in all respects. As to the issue of prospective application, the Court of Appeals stated:

> "The general rule in Ohio is:
>
> "' *** (A) decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that it never was the law. ***' *State, ex rel. Tavenner v. Indian Lake Local School Dist. Bd. of Edn.* (1991), 62 Ohio St. 3d 88, 90 quoting *Peerless Electric Co. v. Bowers* (1955), 164 Ohio St. 209, 210."

On appeal to the Ohio Supreme Court, in a five-two decision, the judgment of the Court of Appeals was reversed and the case remanded to the trial court for further proceedings. In reversing, the Ohio Supreme Court held that:

> "*Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* (1988), 486 U.S. 888, 108 S. Ct. 2218, 100 L. Ed.2d 896, may not be retroactively applied to bar claims in state courts which had accrued prior to the announcement of that decision." (Section 16, Article I, Ohio Constitution, applied).

68 Ohio St. 3d at 240.

In support of its decision, the majority advanced two positions. First, the majority stated that:

> "If *Chevron* remains good law today, then that case—and not *Harper*—provides the proper test to apply to the present case."

68 Ohio St. 3d at 243.

Second, the majority declared that:

> "Even if the *Chevron* test has been replaced by *Harper*, the retroactive application of *Bendix* remains impermissible."

68 Ohio St. 3d at 244.

As to the perceived scope of *Harper v. Virginia Dept. of Taxation*, the majority stated:

> "*Harper* allows state courts to tailor their own remedies as they determine the manner in which a Supreme Court opinion is to be retroactively applied."

68 Ohio St. 3d at 244.

and

> "... when there is a conflict between a state constitutional civil right and a federal rule of decision that is not rooted in the United States Constitution, such as retroactivity, the state civil right prevails."

68 Ohio St. 3d at 245.

With regard to the reference to remedy found in *Harper v. Virginia Dept. of Taxation*, the remedy adopted by the majority was to simply ignore *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* As stated by the majority:

> "The Ohio constitution prohibits us from applying *Bendix* to those claims already accrued when that decision was announced by the United States Supreme Court. If we were to retroactively apply the holding in *Bendix*, we would extinguish the claims of injured persons who had justifiably relied on R.C. 2305.15, because of a subsequent determination by the United States Supreme Court that they could not have foreseen. Such an application would clearly violate the rights of Ohioans to obtain a meaningful opportunity to bring their claims in Ohio's courts. The retroactive application of *Bendix* would violate the rights afforded by Section 16, Article I of the Ohio Constitution, which provides in part:
>
> 'All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.' "

68 Ohio St. 3d at 244.

Two justices dissented. In identifying the correct issue for review, *i.e.*, whether the decision in *Bendix Autolite Corp. v. Midwesco Enterpries, Inc.* applies retroactively to bar Carol L. Hyde's personal injury claim, the dissenters noted the following:

"The majority states in Part I of its opinion that the *Bendix* decision cannot be given retroactive effect under the three-pronged test set forth in *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, 92 S. Ct. 349, 30 L.Ed.2d 296. But the majority also recognizes that the test from *Chevron* may have been replaced by a new rule of retroactivity in *Harper v. Virginia Dept. of Taxation* (1993), 509 U.S. _____, 113 S. Ct. 2510, 125 L.Ed.2d 74."

68 Ohio St. 3d at 246.

"What is absent from the majority's opinion is *any* discussion of the United States Supreme Court opinions which unequivocally state that the retroactivity of constitutional decisions by the United States Supreme Court is purely a matter of federal law. At least three recent opinions make this point clear. Justice O'Connor stated in the court's plurality opinion in *Am. Trucking Assns., Inc. v. Smith, supra*, 496 U.S. at 177, 110 S. Ct. at 2330, 110 L.Ed.2d at 159, that '[t]he determination whether a constitutional decision of this Court is retroactive—that is, whether the decision applies to conduct or events that occurred before the date of decision—*is a matter of federal law.*" (Emphasis added).

68 Ohio St. 3d at 247.

"The Ohio constitution cannot be used, as the majority does today, to revive this unconstitutional statute; that is, our state constitution cannot be used to accomplish what the Commerce Clause forbids. In a word, should the Supreme Court grant review we invite peremptory reversal."

68 Ohio St. 3d at 249.

"The United States Supreme Court has held that the retroactivity of federal constitutional decisions is a matter of federal law, and its holding in this regard is binding on the states under the

Supremacy Clause. We are therefore obligated to apply the federal rules of retroactivity to the case before us, and the rule from *Harper* requires us to give retroactive effect to the *Bendix* decision. The majority disregards federal law and holds that *Bendix* may not be retroactively applied. Because I believe that we are not constitutionally permitted to do so, I respectfully dissent."

68 Ohio St. 3d at 249-250.

A Motion for Rehearing filed on February 18, 1994 was denied by the Ohio Supreme Court on April 6, 1994.

REASONS FOR ALLOWANCE OF WRIT

In refusing to retroactively apply the decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 108 S. Ct. 2218, 100 L. Ed. 2d 896 (1988), to the untimely filing of Carol L. Hyde's Complaint, the majority of the Ohio Supreme Court has brought into play two critical propositions of law that have long been the subject of conflicting judicial inquiry and legal commentary. First, does *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), have any legal applicability in light of the recent decisions reached in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. _____, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991), and *Harper v. Virginia Dept. of Taxation*, 509 U.S. _____, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993). Second, when the United States Supreme Court in the interpretation of federal law declares a state statute unconstitutional, what, if any, freedoms do the states have to limit, restrict or ignore the retroactive application of the United States Supreme Court's holding regarding unconstitutionality.

The holding of the Ohio Supreme Court was that:

> "*Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, (1988), 486 U.S. 888, 108 S. Ct. 2218 100 L. Ed. 2d 896, may not be retroactively applied to bar claims in state courts which had accrued prior to the announcement of that decision." (Section 16, Article I, Ohio Constitution, applied).

68 Ohio St. 3d at 240.

In refusing to retroactively apply *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, the majority relied upon a *Chevron Oil Co. v. Huson* analysis of the underlying case facts. In *James B. Beam Distilling Co. v. Georgia*, six justices agreed with the result that if a new

federal constitutional rule is applied to the litigants in the case in which the rule is announced, the rule applies retroactively to cases that are not barred by procedural requirements or res judicata. In *James B. Beam Distilling Co. v. Georgia*, Justice Souter stated:

> "To this extent, our decision here does limit the possible applications of the *Chevron Oil* analysis, however irrelevant *Chevron Oil* may otherwise be to this case. Because the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to others, the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case."

115 L. Ed. 2d 493.

As further support for its holding, the majority also opined that *Harper v. Virginia Dept. of Taxation* allowed the state courts to tailor their own remedies as they detemine the manner in which a United States Supreme Court opinion is to be applied retroactively. The Ohio Supreme Court further stated that:

> "... when there is a conflict between a state constitutional civil right and a federal rule of decision that is not rooted in the United States Constitution, such as retroactivity, the state civil right prevails."

68 Ohio St. 3d at 245.

Neither statement of the Ohio Supreme Court is supported by the decisional law of this Court or the U.S. Constitution. The instant case presents this Court with an appropriate setting to address the present day viability of *Chevron Oil Co. v. Huson* as well as to provide other courts with guidance and direction when confronted with the issue of retroactivity announced in *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation.*

I. The Continued Reliance Of The Ohio Supreme Court In Deciding Issues Of Retroactivity Based Upon A *Chevron Oil Co. v. Huson* Analysis Is Erroneous In Light Of The Clear Directives Regarding *Chevron Oil Co. v. Huson* And Retroactivity That Are Set Forth In *James B. Beam Distilling Co. v. Georgia* And *Harper v. Virginia Dept. Of Taxation.*

In support of its decision, the majority stated:

> "If *Chevron* remains good law today, then that case—[*Chevron*] and not *Harper*—provides the proper test to apply to the present case."

68 Ohio St. 3d at 243.

If there was any question that *Chevron Oil Co. v. Huson* was not controlling after *James B. Beam Distilling Co. v. Georgia*, 501 U.S. _____, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991), then any such doubt was put to rest when the United States Supreme Court decided *Harper v. Virginia Dept. of Taxation*, 509 U.S. _____, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).

Although *James B. Beam Distilling Co. v. Georgia* did not produce a unified opinion, the majority of the Justices agreed that:

> "... when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata."

115 L. Ed. 2d at 493.

The Court's holding in *James B. Beam Distilling Co. v. Georgia* promoted equality by limiting the possibility for disparate treatment of similarly situated litigants. As stated by Justice Souter:

> "Thus, the question is whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. We hold that it is, principles of equality and stare decisis here prevailing over any claim based on a *Chevron Oil* analysis."

115 L. Ed. 2d at 491.

In his concurring opinion in *James B. Beam Distilling Co. v. Georgia*, with whom Justice Marshall and Justice Blackmun concurred, Justice Scalia, in urging a complete abrogation of any *Chevron Oil Co. v. Huson* inquiry, stated:

> "If the division of federal powers central to the constitutional scheme is to succeed in its objective, it seems to me that the fundamental nature of those powers must be preserved as that nature was understood when the Constitution was enacted. The Executive, for example, in addition to 'tak[ing] Care that the Laws be faithfully executed,' Art II, § 3, has no power to bind private conduct in areas not specifically committed to his control by Constitution or statute; such a perception of '[t]he Executive power' may be familiar to other legal systems, but is alien to our own. So also, I think, '[t]he judicial Power of the United States' conferred upon this Court and such inferior courts as Congress may establish, Art III, § 1, must be deemed to be the judicial power as understood by our common-law tradition. That is the power 'to say what the law is,' *Marbury v. Madison*, 1 Cranch 137, 177, 2 L. Ed. 60 (1803), not the power to change it. I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it as *judges make it*, which is to say as *though* they were 'finding' it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be. Of course this mode of action poses 'difficulties of a ... practical sort,' ante, at—, 115 L. Ed. 2d, at 488, when courts decide

to overrule prior precedent. But those difficulties are one of the understood checks upon judicial law making; to eliminate them is to render courts substantially more free to 'make new law,' and thus to alter in a fundamental way the assigned balance of responsibility and power among the three Branches.

"For this reason, and not reasons of equity, I would find both 'selective prospectivity' and 'pure prospectivity' beyond our power."

115 L. Ed. 2d at 497.

Justice Blackmun, in commenting upon the concept of prospective application of new decisional rules stated:

"We fulfill our judicial responsibility by requiring retroactive application of each new rule we anounce . . . Like Justice Scalia, I conclude that prospectivity, whether 'selective' or 'pure' breaches our obligation to discharge our constitutional function."

115 L. Ed. 2d at 496.

Since the ruling in *James B. Beam Distilling Co. v. Georgia*, other courts have applied retroactivity without consideration of a *Chevron Oil Co. v. Huson* analysis. The North Dakota Supreme Court in *Muller v. Custom Distributors, Inc.*, 487 N.W.2d 1 (1992), had an opportunity to decide a case involving essentially the same issues that are present in the instant case, *i.e.*, a savings statute, a late filing of a Complaint, a request to apply *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* and a potential *Chevron Oil Co. v. Huson* analysis. In declining to resolve the issues on the basis of a *Chevron Oil Co. v. Huson* analysis, the North Dakota Supreme Court stated:

". . . the *Chevron* factors have been limited by the United States Supreme Court's recent decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. _____, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991). In *Beam* the Court considered the issue of retroactive or prospective application of its prior decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S. Ct. 3049, 82 L. Ed. 2d 200 (1984). In *Bacchus*, the Court held that Hawaii's discriminatory tax on alcohol violated the Commerce Clause. In *Beam* the Court considered Georgia's similar discriminatory tax on alcohol. Although there was no majority opinion in *Beam*, six justices ultimately concluded that the Court's decision in *Bacchus* about the Hawaii taxes applied retroactively to *Beam* and the Georgia taxes.

* * *

"Thus, in *Beam* six justices agreed with the result that if a new federal constitutional rule is applied to the litigants in the case in which the rule is announced, the rule applies retroactively to cases that are not barred by procedural requirements or res judicata. * * *

"In *Bendix* the Court held that Ohio's tolling statute violated the federal constitution. The Court rejected the plaintiff's request for prospective application because that argument was not raised in the lower courts. The *Bendix* court thus applied its decision to the parties in that case and affirmed the dismissal of the plaintiff's lawsuit on the ground that it was barred by the statute of limitations. Although we have only now, in this opinion, declared Section 28-01-32, N.D.C.C., unconstitutional, under *Beam* the choice of law issue is governed by the federal rule announced in *Bendix*[1]

[1] "*Beam* was limited to decisions changing federal law. Under *Sunburst*, state courts are not precluded from using the *Chevron* facts in decisions changing state law such as *First Interstate Bank of Fargo v. Larson*, 475 N.W. 2d 538 (N.D. 1991). *See Martin Marietta Corp. v. Lorenz*, 823 P.2d 100 (Colo. 1992) [Retroactive application of state judicial decision announcing a new rule of tort law governed by *Chevron* analysis]." *Bendix* was, however, concerned with a new federal constitutional rule.

and that decision applies retroactively to the Muller's action."

487 N.W.2d at 4-5.

The *Muller* court went on to state:

"We conclude that under *Beam*, the Supreme Court's decision in *Bendix* and our decision in this case apply retroactively to the lawsuit. Accordingly, we affirm the summary judgment dismissing the Muller's action."

487 N.W.2d at 6.

Noteworthy was the *Muller* court footnote that:

"Because of our resolution of this case, we need not analyze this case under the *Chevron* factors."

487 N.W.2d at 6.

Likewise, in *Bottineau Farmers Elevator v. Woodward-Clyde*, 963 F.2d 1064 (8th Cir. 1992), the Court stated:

"We do not think our commerce clause ruling should be applied only prospectively and not to the parties in this case. In the present case, retroactive applicability is a federal question because the ruling itself is derived from federal constitutional law. *See American Trucking Assns. v. Smith*, 496 U.S. 167, 110 S. Ct. 2323, 2330, 110 L. Ed. 2d 148 (1990) (plurality opinion). Retroactive application of the ruling to the parties before the court is consistent with the Supreme Court's recent decision in *James B. Beam Distilling Co. v. Georgia*, _____ U.S. _____, 111 S. Ct. 2439, 2445-46, 115 L. Ed. 2d 481 (1991), in which the Court announced that full retroactivity is the normal rule in civil cases and limited the applicability of the *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), test for prospectivity."

963 F.2d at 1074, 1075.

See also Boudrea v. Deloitte, Haskins & Sells, 942 F.2d 497 (8th Cir. 1991) (*per curiam*); *Welch v. Cadre Capital*, 946 F.2d 185 (Welch II) (2d Cir. 1991), *on remand from*, 111 S. Ct. 2882 (1991).

In discussing *Chevron Oil Co. v. Huson* and its applicability to *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* and O.R.C. §2305.15, the Ohio Supreme Court stated:

"The facts in the present case pass the three-pronged *Chevron* test for nonretroactivity. The United States Supreme Court's opinion in *Bendix, supra*, was the first time that any court of binding authority in Ohio's state courts had ruled R.C. 2305.15 unconstitutional. When Hyde was injured, she could not have foreseen that R.C. 2305.15 would be struck down four years later. 'the most [s]he could do was to rely on the law as it then was.' *Chevron*, 404 U.S. at 107, 92 S. Ct. 356, 30 L. Ed. 2d at 306."

68 Ohio St. 3d at 243.

The Ohio Supreme Court's reliance upon *Chevron Oil Co. v. Huson* is misplaced in light of *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation*. As stated by Justice Thomas in *Harper v. Virginia Dept. of Taxation*:

"We need not debate whether Chevron Oil represents a true 'choice-of-law principle' or merely 'a remedial principle for the exercise of equitable discretion by federal courts.' *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 220, 110 L. Ed. 2d 148, 110 S. Ct. 2323 (1990) (Stevens, J., dissenting). Compare id., at 191-197, 110 L. Ed. 2d 148, 110 S. Ct. 2323 (plurality opinion) (treating *Chevron Oil* as a choice-of-law rule), with id., at 218-224, 110 L. Ed. 2d 148, 110 S. Ct. 2323 (Stevens, J., dissenting) (treating *Chevron Oil* as a remedial doctrine). Regardless of how *Chevron Oil* is

> characterized, our decision today makes it clear that 'the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case' and that the federal law applicable to a particular case does not turn on 'whether [litigants] actually relied on [an] old rule [or] how they would suffer from retroactive application' of a new one."

125 L. Ed. 2d at Fn. 9, pg. 85.

By virtue of the clear directives set forth in *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation*, the logic and reasoning of the Ohio Supreme Court in continuing to rely upon *Chevron Oil Co. v. Huson* is erroneous.

The lukewarm reliance by the majority in relying upon *Chevron Oil Co. v. Huson* to support its holding is noted not only from the dissent but the majority as well. With regard to the latter, the majority stated:

> "Whether or not the *Chevron* test remains good law today, we hold that *Bendix* may not be retroactively applied to bar claims which had accrued prior to the announcement of that decision."

68 Ohio St. 3d at at 246.

In commenting upon the *Chevron Oil Co. v. Huson* test, the dissent stated:

> "The majority actually makes no serious effort to apply this test. The majority's effort is limited to a three-sentence analysis of prong one and a one-sentence dismissal of the remaining two prongs, concluding that this case and the *Chevron* case are so factually similar that any discussion of the remainder of the test is unnecessary. It appears from this casual treatment of the test from *Chevron* that the majority intends for its decision to rest entirely upon the state grounds announced in Part II of its opinion."

68 Ohio St. 3d at Fn. 2, pg. 246.

II. The Ohio Supreme Court Ruling Regarding Its Refusal To Retroactively Apply *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* Is Violative Of The Supremacy Clause Of The United States Constitution Which Prohibits The Federal Retroactivity Doctrine To Be Supplanted By The Invocation Of A Contrary Approach To Retroactivity Under State Law.

In *Harper v. Virginia Dept. of Taxation*, the Court held that *Davis v. Michigan Department of the Treasury*, 489 U.S. 803, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989), applied retroactively to invalidate all state taxation schemes similar to Michigan's. *Harper v. Virginia Dept. of Taxation* also prescribed a general rule that required the Court's decisions to be applied retroactively.

The rule of law announced in *Harper v. Virginia Dept. of Taxation* is clear and to the point. As stated by Justice Thomas:

> "*Beam* controls this case, and we accordingly adopt a rule that fairly reflects the position of a majority of Justices in *Beam*: *When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.* This rule extends *Griffith's* ban against 'selective application of new rules.' 479 U.S., at 323, 93 L. Ed. 2d 649, 107 S. Ct. 708. Mindful of the 'basic norms of constitutional adjudication' that animated our view of retroactivity in the criminal context, id., at 322, 93 L. Ed. 2d 649, 107 S. Ct. 708, we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases. In both civil and criminal cases, we can scarcely permit 'the substantive law [to] shift and spring' according to

> 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule. *Beam, supra,* at _____, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (opinion of Souter, J.). Our approach to retroactivity heeds the admonition that '[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.' *American Trucking, supra,* at 214, 110 L. Ed. 2d 148, 110 S. Ct. 2323 (Stevens, J., dissenting)." (Emphasis supplied).

125 L. Ed. 2d at 86.

Just as *Griffith v. Kentucky,* 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), eliminated limits on retroactivity in the criminal context by overruling *Linkletter v. Walker,* 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 601 (1965), *Harper v. Virginia Dept. of Taxation* has achieved the same result in the civil arena. Today, as a result of *Harper v. Virginia Dept. of Taxation,* there should be no impediments standing in the way that a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all Courts adjudicating federal law. The majority in the instant case has chosen to ignore the rule set forth in *Harper v. Virginia Dept. of Taxation* thus creating an impediment to the application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* in Ohio.

In seeking to circumvent the ruling in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.,* the majority has chosen to ignore the Supremacy Clause of the U.S. Constitution. As stated by Justice Thomas:

> "The Supremacy Clause, U.S. Const., Art. VI, cl 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive

> operation of their own interpretations of state law, see *Great Northern R. Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 364-366, 77 L. Ed. 360, 53 S. Ct. 145, 85 ALR 254 (1932), cannot extend to their interpretations of federal law. See *National Mines Corp. v. Caryl,* 497 U.S. 922, 923, 111 L. Ed. 2d 740, 110 S. Ct. 3205 (1990) (per curiam); *Ashland Oil, Inc. v. Caryl,* 497 U.S. 916, 917, 111 L. Ed. 2d 734, 110 S. Ct. 3202 (1990) (per curiam)."

125 L. Ed. 2d at pg. 88.

The decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* was decided on the basis of a violation of the Commerce Clause to the U.S. Constitution, clearly an issue involving federal law. In seeking to circumvent the rule announced in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.,* the majority has sought to except itself from the directives of *Harper v. Virginia Dept. of Taxation* by stating:

> "The *Harper* court went on to note that a state, when retroactively applying a Supreme Court decision, 'retains flexibility' in fashioning appropriate relief."

68 Ohio St. 3d at 244.

The relief fashioned by the majority is not the tax remedy referred to in *Harper v. Virginia Dept. of Taxation.* To the contrary, it is the wrongful validation of an unconstitutional statute. As noted by the Court in *Harper v. Virginia Dept. of Taxation*:

> "The constitutional sufficiency of any remedy thus turns (at least initially) on whether Virginia law 'provide[s] a[n] [adequate] form of 'predeprivation process,' for example, by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding.'

> *McKesson*, 496 U.S., at 36-37, 110 L. Ed. 2d 17, 110 S. Ct. 2238. Because this issue has not been properly presented, we leave to Virginia courts this question of state law and the performance of other tasks pertaining to the crafting of any appropriate remedy. Virginia 'is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined.' *Id.*, at 51-52, 110 L. Ed. 2d 17, 110 S. Ct. 2238. State law may provide relief beyond the demands of federal due process, id., at 52, n. 36, 110 L. Ed. 2d 17, 110 S. Ct. 2238, but under no circumstances may it confine petitioners to a lesser remedy, see id., at 44-51, 110 L. Ed. 2d 17, 110 S. Ct. 2238."

125 L. Ed. 2d at 89.

The facts underlying the instant case are far different from the tax issue presented in *Harper v. Virginia Dept. of Taxation.* Whereas *Harper v. Virginia Dept. of Taxation* was a fully adjudicated case, the instant case has not proceeded beyond the pleading stage. No trial has been held regarding a finding of liability. As noted by the dissent:

> "No trial has been held to determine whether liability exists at all, and a finding of liability must always precede any attempt to tailor a remedy. The court's discussion of a remedy in *Harper* arose only because the court had *already decided the liability issue.* Of course, that decision has not been made in this case.

68 Ohio St. 3d at 247.

Bendix Autolite Corp. v. Midwesco Enterprises, Inc. was decided on the basis of the Commerce Clause to the United States Constitution that Ohio had no authority to toll its statute of limitations against out-of-state entities. Quite simply, O.R.C. §2305.15 is unconstitutional.

Despite the clear pronouncement of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* and the rule set forth in *Harper v. Virginia Dept. of Taxation,* the majority has attempted to erect a "... selective temporal barrier ..." (*Harper v. Virginia Dept. of Taxation,* 125 L. Ed. 2d at pg. 86) to the application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* to civil cases pending in Ohio. Such conduct is violative of the admonition of Justice Thomas in *Harper v. Virginia Dept. of Taxation* when he stated:

> "Mindful of the 'basic norms of constitutional adjudication' that animated our view of retroactivity in the criminal context, id., at 322, 93 L. Ed. 2d 649, 107 S. Ct. 708, we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases. In both civil and criminal cases, we can scarcely permit 'the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule. *Beam, supra,* at _____, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (opinion of Souter, J.). Our approach to retroactivity heeds the admonition that '[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.' *American Trucking, supra,* at 214, 110 L. Ed. 2d 148, 110 S. Ct. 2323 (Stevens, J., dissenting)."

125 L. Ed. 2d at 86.

The rationale for the erection of a barrier to the retroactive application of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* was stated by the majority as follows:

> "*Harper* allows state courts to tailor their own remedies as they determine the manner in which a Supreme Court opinion is to be retroactively applied."

68 Ohio St. 3d at 244.

No case support was cited by the majority for its sweeping assertion. Likewise, the majority failed to support its statements that:

> "We find that when there is a conflict between a state constitutional civil right and a federal rule of decision that is not rooted in the constitution, such as retroactivity; the state civil right prevails."

68 Ohio St. 3d at 245.

> "This conflict between the federal rule of retroactivity and Ohio's right to a remedy must be resolved in favor of the state constitutional civil right."

68 Ohio St. 3d at 245.

The state constitutional civil right that the majority so jealously seeks to protect is the state equivalent of the "due process of law" provision in the Fourteenth Amendment to the United States Constitution, a right guaranteed to all citizens of the United States by the United States Constitution. *Sorrell v. Thevenir*, 69 Ohio St. 3d 415, 422 (1994).

In commenting upon the majority's inability to support its decision with case precedent, the dissent stated:

> "What is absent from the majority's decision is *any* discussion of the United States Supreme Court opinions which unequivocally state that the retroactivity of constitutional decisions by the United States Supreme Court is purely a matter of federal law. At least three recent opinions make this

> point clear. Justice O'Connor stated in the court's plurality opinion in *Am. Trucking Assns., Inc. v. Smith, supra*, 496 U.S. at 177, 110 S. Ct. at 2330, 110 L. ED. 2d at 159, that '[t]he determination whether a constitutional decision of this Court is retroactive—that is, whether the decision applies to conduct or events that occurred before the date of the decision—*is a matter of federal law.*' (Emphasis added.) Quoting this language, the court in *Ashland Oil, Inc. v. Caryl* (1990), 497 U.S. 916, 918, 110 S. Ct. 3202, 3204, 111 L. Ed. 2d 734, 737, refused to apply the West Virginia Supreme Court's state-law criteria for retroactivity, stating instead that the court must examine whether to give retroactive effect to a constitutionally based decision 'in light of *our* nonretroactivity doctrine.' (Emphasis added.)
>
> "Finally, the Virginia Supreme Court in *Harper* had attempted to deny retrospective effect to the United States Supreme Court's decision in *Davis v. Michigan Dept. of Treasury* (1989), 489 U.S. 803, 109 S. Ct. 1500, 103 L. Ed. 2d 891, by resting its judgment on 'independent and adequate' state grounds. The United States Supreme Court rebuffed the Virginia court's effort at avoiding the application of federal rules of retroactivity by stating:
>
> > 'The Supremacy Clause, U.S. Const., Art. VI, cl. 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law * * * cannot extend to their interpretations of federal law.' *Id.*, 509 U.S. at _____, 113 S. Ct. at 2519, 125 L. Ed. 2d at 88."

68 Ohio St. 3d at 247-248.

Despite O.R.C. §2305.15 having been declared unconstitutional, the majority has chosen to disregard *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* and

applied its own interpretation of federal law to the question of retroactivity. In a word, the majority has transformed an unconstitutional statute into a statute that has the full force and effect of constitutionality by resort to what Justice Thomas decried, that being the erection of selective temporal barriers to the application of federal law in civil cases.

The Supremacy Clause to the United States Constitution does not allow the federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. O.R.C. §2305.15 is unconstitutional and *Harper v. Virginia Dept. of Taxation* requires that *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* be given full retroactive effect in all cases still open on direct review and to all events, regardless of whether such events predate or postdate the announcement of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*,

The rules of law established by the majority, *i.e.*, the rights of the states to tailor their own remedies regarding retroactivity and the assertion that a state civil right supplants the strict federal rule of retroactivity announced in *James B. Beam Distilling Co. v. Georgia* and *Harper v. Virginia Dept. of Taxation* are not supported by statute or case law. As noted by the dissent:

> "The Ohio Constitution cannot be used, as the majority does today, to revive this unconstitutional statute; that is, our state constitution cannot be used to accomplish what the Commerce Clause forbids. In a word, should the Supreme Court grant review we invite peremptory reversal."

68 Ohio St. 3d at 249.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM E. RIEDEL
Counsel of Record
WARREN AND YOUNG
P. O. Box 278
134 West 46th Street
Ashtabula, Ohio 44004
(216) 997-6175
Attorney for Petitioners

APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided February 9, 1994)

Case No. 92-1682

CAROL L. HYDE,
Appellant,

v.

REYNOLDSVILLE CASKET CO., *et al.*,
Appellees.

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[240] [Cite as *Hyde v. Reynoldsville Casket Co.* (1994), 68 Ohio St.3d 240.]

Statutes of limitations—Recent United States Supreme Court decision may not be retroactively applied to bar claims in state courts which had accrued prior to the announcement of that decision—Section 16, Article I, Ohio Constitution, applied.

Bendix Autolite Corp. v. Midwesco Enterprises, Inc. (1988), 486 U.S. 888, 108 S.Ct. 2218, 100 L.Ed.2d 896, may not be retroactively applied to bar claims in [241] state courts which had accrued prior to the announcement of that decision. (Section 16, Article I, Ohio Constitution, applied.)

See: West's Ohio Digest, Courts 100(1).

(No. 92-1682—Submitted September 28, 1993—Decided February 9, 1994.)

APPEAL from the Court of Appeals for Ashtabula County, No. 91-A-1660.

On March 5, 1984, appellant Carol L. Hyde was injured in a traffic accident in Ashtabula County, Ohio, allegedly caused by the negligence of John M. Blosh while he was operating a vehicle owned by the Reynoldsville Casket Company ("RCC").

It is not disputed that RCC is a Pennsylvania corporation which is not licensed to do business in Ohio and has not appointed an agent to receive service of process in the state.

On August 11, 1987, Hyde filed a complaint in the Court of Common Pleas of Ashtabula County. The complaint alleged that Blosh had negligently caused Hyde's injuries and contended that because "Blosh's actions were in the scope and course of his employment with the [Reynoldsville] Casket Co.," RCC was also liable for those injuries.

On February 8, 1988, RCC and Blosh then filed a motion to dismiss, claiming that the complaint was barred by Ohio's statute of limitations. The trial court granted the motion, and the court of appeals affirmed the trial court's decision.

This cause is now before this court pursuant to the allowance of a motion to certify the record, 65 Ohio ST.3d 1456, 602 N.E.2d 252.

David J. Eardley, for appellant.

William E. Riedel, for appellees.

Williams, Jilek, Lafferty & Gallagher Co., L.P.A., and *Dale M. Grocki,* urging reversal for *amicus curiae,* Ohio Academy of Trial Lawyers.

Brown & Szaller Co., L.P.A., and *James F. Szaller,* urging reversal for *amicus curiae,* Brown & Szaller Co., L.P.A.

Spangenberg, Shibley, Traci, Lancione & Liber, Robert A. Marcis and *Cathleen M. Bolek,* urging reversal for *amicus curiae,* Spangenberg, Shibley, Traci, Lancione & Liber.

Arter & Hadden, Irene C. Keyse-Walker and *Robert C. Tucker,* urging affirmance for *amicus curiae,* Dalkon Shield Claimants Trust.[1]

[241] PFEIFER, *J.* This court is asked to determine whether the United States Supreme Court decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* (1988), 486 U.S. 888, 108 S.Ct. 2218, 109 L.Ed.2d 896, holding the Ohio tolling statute, R.C. 2305.15(A), to be unconstitutional, should be retroactively applied to Hyde's complaint filed against RCC and Blosh. For the following reasons, we determine that *Bendix* may not be retroactively applied.

Unless Hyde may utilize the tolling provision in R.C. 2305.15(A), her claim is precluded by the applicable statute of limitations. In Ohio, the period of limitations for a personal injury negligence action is two years. R.C. 2305.10. Hyde filed her complaint seventeen months after this two-year period had expired. At the time of the accident, R.C. 2305.15, now 2305.15(A), tolled the limitations period for claims against out-of-state defendants by providing:

> "When a cause of action accrues against a person, if he is out of the state, or has absconded, or conceals himself, the period of limitation for the

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[1] The motion of the Dalkon Shield Claimants Trust for leave to file a brief *amicus curiae* is hereby granted.

> commencement of the action as provided in sections 2305.04 to 2305.14 * * * of the Revised Code, does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, or absconds or conceals himself, the time of his absence of concealment shall not be computed as any part of a period within which the action must be brought." 129 Ohio Laws 177.

It is not alleged that RCC re-entered the state of Ohio after the accident of March 5, 1984. Pursuant to R.C. 2305.15, the limitations period for Hyde to bring an action against RCC was tolled, and had not elapsed when Hyde filed her complaint. See *Seeley v. Expert, Inc.* (1971), 26 Ohio St.2d 61, 55 O.O.2d 120, 269 N.E.2d 121.

Nearly one year after Hyde filed her complaint, the United States Supreme Court determined that the tolling provision in R.C. 2305.15 violated the Commerce Clause of the United States Constitution when applied to out-of-state entities. *Bendix, supra.* In its opinion, the *Bendix* court specifically declined to determine whether its ruling should be applied prospectively only. *Id.*, 486 U.S. at 806, 108 S.Ct. at 2222-2223, 100 L.Ed.2d at 905.

We are now confronted with the task of determining whether the *Bendix* decision is to be applied retroactively. Until recently, *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296, provided the three-part test to determine whether courts should retroactively apply a decision of the United States Supreme Court when the result is to shorten limitations periods of cases accrued before the decision was announced. However, in *Harper v. Virginia Dept. of Taxation* (1993), 509 U.S. _____, 113 S.Ct. 2510, 125

L.Ed.2d 74, the United States Supreme Court announced a new test concerning the retroactive [243] application of decisions. It is unclear whether *Harper* was intended to replace *Chevron*, or to supplement it.

I

If *Chevron* remains good law today, then that case—and not *Harper*—provides the proper test to apply to the present case. The present case is closer to *Chevron* than to *Harper*. *Harper* determined that a United States Supreme Court decision striking down a Michigan taxing practice as unconstitutional must be retroactively applied to Virginia taxpayers taxed under a similar statute. *Chevron* discusses whether a ruling which shortens a limitations period should be retroactively applied.

Chevron sets forth the following three-pronged test to determine when a holding of the United States Supreme Court should not be retroactively applied:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *. Second, it has been stressed that 'we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' * * * Finally, we have weighed the inequity imposed by retroactive application, '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' " 404 U.S. at 106-107, 92 S.Ct. at 355, 30 L.Ed.2d at 306.

The facts in the present case pass the three-pronged *Chevron* test for nonretroactivity. The United States Supreme Court's opinion in *Bendix, supra,* was the first time that any court of binding authority in Ohio's state courts had ruled R.C. 2305.15 unconstitutional. When Hyde was injured, she could not have foreseen that R.C. 2305.15 would be struck down four years later. "The most [s]he could do was to rely on the law as it then was." *Chevron,* 404 U.S. at 107, 92 S.Ct. at 356, 30 L.Ed.2d at 306.

Because of the factual similarities between the present case and *Chevron,* it is unnecessary to discuss the other two prongs of the *Chevron* test. The *Chevron* court held that the retroactive application of a rule shortening the limitations period in a tort case fulfilled the last two requirements of the test for nonretroactivity. Because all three requirements of the *Chevron* test are likewise fulfilled in this case, we determine that *Bendix* cannot be retroactively applied.

[244] Even if the *Chevron* test has been replaced by *Harper,* the retroactive application of *Bendix* remains impermissible.

In *Harper,* the United States Supreme Court determined that its prior decision in *Davis v. Michigan Dept. of Treasury* (1989), 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891, should be retroactively applied. The *Davis* decision declared that it was unconstitutional for the state of Michigan to tax retirement benefits paid by the federal government when that state exempts retirement benefits paid by the state or its political subdivisions. The state of Virginia, in *Harper,* argued that *Davis* should not be retroactively applied.

The United States Supreme Court rejected Virginia's argument, holding that *Davis* must be retroactively applied. However, the Supreme Court declined to enter judgment for the taxpayers "because federal law does not necessarily entitle them to a refund." *Harper, supra,* 509 U.S. at _____, 113 S.Ct. at 2519, 125 L.Ed.2d at 88. The *Harper* court went on to note that a state, when retroactively applying a Supreme Court decision, " 'retains flexibility' " in fashioning appropriate relief. *Id.* at _____, 113 S.Ct. at 2518, 125 L.Ed.2d at 89, quoting *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco* (1990), 496 U.S. 18, 39-40, 110 S.Ct. 2238, 2252, 110 L.Ed.2d 17, 38. *Harper* allows state courts to tailor their own remedies as they determine the manner in which a Supreme Court opinion is to be retroactively applied.

The Ohio Constitution prohibits us from applying *Bendix* to those claims already accrued when that decision was announced by the United States Supreme Court. If we were to retroactively apply the holding in *Bendix,* we would extinguish the claims of injured persons who had justifiably relied on R.C. 2305.15, because of a subsequent determination by the United States Supreme Court that they could not have foreseen. Such an application would clearly violate the rights of Ohioans to obtain a meaningful opportunity to bring their claims in Ohio's courts. The retroactive application of *Bendix* would violate the rights afforded by Section 16, Article I of the Ohio Constitution, which provides in part:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

In *Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45, 512 N.E.2d 626, this court held that "R.C. 2305.11(B), as applied to bar the claims of medical malpractice plaintiffs who did not know or could not reasonably have known of their injuries, violates the right-to-a-remedy provision of Section 16, Article I of the Ohio Constitution." *Id.* at syllabus.

[245] In *Burgess v. Eli Lilly & Co.* (1993), 66 Ohio St.3d 59, 62, 609 N.E.2d 140, 142, we proclaimed that when the Ohio Constitution speaks of remedy for injury to person, property or reputation, it requires an opportunity for redress that is granted at a meaningful time and in a meaningful manner.

It is hard to imagine a right to a remedy less meaningful than one which, while valid at the time an individual is injured, is subsequently revoked. This is precisely the outcome that a retroactive application of *Bendix* dictates. In not filing her complaint against RCC until 1987, Hyde relied on Ohio's tolling statute, R.C. 2305.15, and the most recent interpretation of that statute by the court of appeals in her appellate district, *May v. Leidli* (1986), 32 Ohio App.3d 36, 513 N.E.2d 1347. No court of binding precedent in Ohio had ever ruled that R.C. 2305.15(A) was unconstitutional. Nearly one year after Hyde's complaint was filed, *Bendix* was announced.

At the time Hyde was injured, she possessed a state constitutional civil right to file a lawsuit relying on R.C. 2305.15(A). This right conflicts with a federal rule of decision, which requires the retroactive application of federal rules of law such as the *Bendix* decision.

We find that when there is a conflict between a state constitutional civil right and a federal rule of decision that is not rooted in the United States Constitution,

such as retroactivity, the state civil right prevails. As we noted in *Arnold v. Cleveland* (1993), 67 Ohio St. 3d 35, 616 N.E.2d 163, paragraph one of the syllabus:

> "The Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups."

In this case, the federal rule of decision—retroactivity—is not rooted in the United States Constitution. The United States Supreme Court may strike down provisions in the Ohio Constitution when they are unconstitutional, but may not invalidate them simply because they conflict with a court-created doctrine of uniformity, such as the requirement that decisions be retroactively applied.

This conflict between the federal rule of retroactivity and Ohio's right to a remedy must be resolved in favor of the state constitutional civil right.

Our decision today does not contravene the federal constitutional analysis in *Bendix*, but, instead, allows Section 16, Article I of the Ohio Constitution and the Commerce Clause of the federal Constitution to co-exist.

[246] Whether or not the *Chevron* test remains good law today, we hold that *Bendix* may not be retroactively applied to bar claims which had accrued prior to the announcement of that decision.

Accordingly, the judgment of the court of appeals is reversed and the cause is remanded to the trial court for further proceedings.

Judgment reversed, and cause remanded.

A.W. SWEENEY, DOUGLAS, RESNICK and F.E. SWEENEY, *JJ.*, concur.

MOYER, C.J., and WRIGHT, *J.*, dissent.

WRIGHT, *J.*, dissenting. The issue in this case is whether the decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* (1988), 486 U.S. 888, 108 S.Ct. 2218, 100 L.Ed.2d 896, applies retroactively to bar appellant's personal injury claim. The majority answers this question with a confusing opinion containing an assortment of retroactivity doctrine. Present in the opinion are two rules of federal law, only one of which is actually described, and one brand new and unsupportable rule of state law.

I

The majority states in Part I of its opinion that the *Bendix* decision cannot be given retroactive effect under the three-pronged test set forth in *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296.[2]

[2] The majority actually makes no serious effort to apply this test. The majority's effort is limited to a three-sentence analysis of prong one and a one-sentence dismissal of the remaining two prongs, concluding that this case and the *Chevron* case are so factually similar that any discussion of the remainder of the test is unnecessary. It appears from this casual treatment of the test from *Chevron* that the majority intends for its decision to rest entirely upon the state grounds announced in Part II of its opinion.

But the majority also recognizes that the test from *Chevron* may have been replaced by a new rule of retroactivity in *Harper v. Virginia Dept. of Taxation* (1993), 509 U.S. _____, 113 S.Ct. 2510, 125 L.Ed.2d 74. Then without even so much as describing the new rule from *Harper* (*i.e.*, the holding), the majority goes on to state the correct but wholly irrelevant fact that the plaintiffs in *Harper* were not necessarily entitled to a refund of the taxes and that the state of Virginia retained some flexibility in fashioning appropriate relief. Based on this discussion of the appropriate remedy for the plaintiffs in *Harper*, the majority makes the extraordinary statement that "*Harper* allows state courts to tailor their own remedies as they determine the manner in which a Supreme Court opinion is to be retroactively applied." The [247] majority then proceeds to use this statement as the foundation for its new state law rule of retroactivity.

Such a statement would not merit much attention were it not for the fact that the remainder of the majority's opinion rests in its entirety on this "new rule." It is indeed curious that a discussion of "tailoring a remedy" has even surfaced in this case. After all, this case has not yet proceeded beyond the pleading stage. No trial has been held to determine whether liability exists at all, and a finding of liability must always precede any attempt to tailor a remedy. The court's discussion of a remedy in *Harper* arose only because the court had *already decided the liability issue.* Of course, that decision has not been made in this case.

Moreover, the question of an appropriate remedy for the plaintiffs in *Harper* arose only because the plaintiffs sought a *refund* of taxes, and, as the court noted, federal law does not necessarily entitle them to a refund. *Id.*, 509

U.S. at _____, 113 S.Ct. at 2519, 125 L.Ed.2d at 88. Instead, the court held that the state of Virginia could choose any relief it wished so long as that relief was " 'consistent with federal due process principles.' " *Id.*, quoting *Am. Trucking Assns., Inc. v. Smith* (1990), 496 U.S. 167, 181, 110 S.Ct. 2323, 2332, 110 L.Ed.2d 148, 161. One commentator has suggested that Virginia could impose retroactive taxes on state retirees, along with retroactive pension increases to offset the resulting tax liability. See Rakowski, *Harper* and Retroactive Remedies: Why States' Fears are Exaggerated (1993), 59 Tax Notes 555, 558-559. No one has suggested, however, that states use the remedy issue as a way to avoid application of the retroactivity rule from *Harper,* which is precisely what the majority accomplishes with its ruling.

What is absent from the majority's opinion is *any* discussion of the United States Supreme Court opinions which unequivocally state that the retroactivity of constitutional decisions by the United States Supreme Court is purely a matter of federal law. At least three recent opinions make this point clear. Justice O'Connor stated in the court's plurality opinion in *Am. Trucking Assns., Inc. v. Smith, supra,* 496 U.S. at 177, 110 S.Ct. at 2330, 110 L.Ed.2d at 159, that "[t]he determination whether a constitutional decision of this Court is retroactive—that is, whether the decision applies to conduct or events that occurred before the date of the decision—*is a matter of federal law.*" (Emphasis added.) Quoting this language, the court in *Ashland Oil, Inc. v. Caryl* (1990), 497 U.S. 916, 918, 110 S.Ct. 3202, 3204, 111 L.Ed.2d 734, 737, refused to apply the West Virginia Supreme Court's state-law criteria for retroactivity, stating instead that the court must examine whether to

give retroactive effect to a constitutionally based decision "in light of *our* nonretroactivity doctrine." (Emphasis added.)

[248] Finally, the Virginia Supreme Court in *Harper* had attempted to deny retrospective effect to the United States Supreme Court's decision in *Davis v. Michigan Dept. of Treasury* (1989), 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891, by resting its judgment on "independent and adequate" state grounds. The United States Supreme Court rebuffed the Virginia court's effort at avoiding the application of federal rules of retroactivity by stating:

> "The Supremacy Clause, U.S. Const., Art. VI, cl. 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law * * * cannot extend to their interpretations of federal law." *Id.*, 509 U.S. at _____, 113 S.Ct. at 2519, 125 L.Ed.2d at 88.

However stated, it is clear that federal law controls the issue before us. The majority cites *no* authority for its assertion in Part II of its opinion that a conflict between a state constitutional civil right and a federal rule of decision that is not rooted in the United States Constitution must be resolved in favor of the state civil right. Commentators who have examined the issue would disagree. The federal rule of retroactivity—called a federal rule of decision by the majority—is not, as the majority correctly points out, rooted in the Constitution. See *Solem v. Stumes* (1984), 465 U.S. 638, 642, 104 S.Ct. 1338, 1341, 79 L.Ed.2d 579, 586 ("retroactive application [of judicial decisions] is not compelled, constitutionally or otherwise"). Instead it may be described as a federal

common-law rule. See Field, Sources of Law: The Scope of Federal Common Law (1986), 99 Harv.L.Rev. 883, 890 (defining "federal common law" as "any rule of federal law created by a court * * * when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional" [emphasis deleted]). Regardless of its origin, however, federal common law is still "law" within the meaning of the Supremacy Clause and is binding on state court judges. *Id.* at 897 and fn. 64. For this reason, and because the statements by the Supreme Court in the above-mentioned cases directly contradict the majority's assertion, I believe that in this case we cannot apply a state rule of retroactivity. We are bound by the Supremacy Clause of the United States Constitution to apply federal law, even if we believe the application of state law would produce a more palatable result.

The strict rule of retroactivity in the civil context announced by the court in *Harper* is as follows: "[T]his Court's application of a rule of federal law to the parties before the Court requires *every court* to give retroactive effect to that decision." (Emphasis added.) *Id.*, 509 U.S. at _____, 113 S.Ct. at 2513, 125 L.Ed.2d at 81. I do agree with the majority that there is a serious question as to whether *Chevron* remains good law after the decision in *Harper*. The court in [249] *Harper* did not analyze the retroactivity question under *Chevron* but instead created a rule of strict retroactivity similar to the rule of retroactivity in the criminal context as set forth by the court in *Griffith v. Kentucky* (1987), 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649. The *Harper* court did state, however, that the normal rule of retroactive application of its decisions must be followed "[w]hen this Court does not 'reserve the question whether its holding should be applied to the parties before it[.]' " *Id.*, 509

U.S. at _____, 113 S.Ct. at 2518, 125 L.Ed.2d at 86-87, quoting *James B. Beam Distilling Co. v. Georgia* (1991), 501 U.S. _____, _____, 111 S.Ct. 2439, 2445, 115 L.Ed.2d 481, 490. Thus, at best it seems that *Chevron* remains good law only when the court reserves the question of retroactivity.

The court in *Bendix* did not reserve the question of retroactivity. Instead the court applied the decision to the parties before it by affirming the dismissal of the plaintiff's cause of action. *Bendix*, 486 U.S. at 895, 108 S.Ct. at 2222-2223, 100 L.Ed.2d at 905. Therefore, under the rule announced in *Harper*, we must give retroactive effect to the *Bendix* decision. Appellant is thus prohibited from using the unconstitutional tolling provision, former R.C. 2305.15, and her claim, filed more than three and one-half years after her accident, is barred by the two-year statute of limitations for personal injury actions. See R.C. 2305.10.

II

I quite agree with the majority that the Ohio Constitution is a "document of independent force" and that we therefore need not always proceed in lock-step fashion with the United States Supreme Court on constitutional matters. And if this case involved individual rights or civil liberties, areas in which the United States Constitution merely sets a floor for our decisions, I might feel inclined to hold that the Ohio Constitution can form the basis for our opinion. But this case deals with the question of whether to give retroactive effect to a case decided by the United States Supreme Court on Commerce Clause grounds. The Commerce Clause does not implicate individual rights and civil liberties, it simply allocates power between the

federal government and the states. The court in *Bendix* ruled that Ohio has no power, under the Commerce Clause, to toll its statute of limitations against out-of-state entities. The Ohio Constitution cannot be used, as the majority does today, to revive this unconstitutional statute, that is, our state constitution cannot be used to accomplish what the Commerce Clause forbids. In a word, should the Supreme Court grant review we invite peremptory reversal.

III

The United States Supreme Court has held that the retroactivity of federal constitutional decisions is a matter of federal law, and its holding in this regard is [250] binding on the states under the Supremacy Clause. We are therefore obligated to apply the federal rules of retroactivity to the case before us, and the rule from *Harper* requires us to give retroactive effect to the *Bendix* decision. The majority disregards federal law and holds that *Bendix* may not be retroactively applied. Because I believe that we are not constitutionally permitted to do so, I respectfully dissent.

MOYER, *C.J.*, concurs in the foregoing dissenting opinion.

JUDGMENT ENTRY AND OPINION OF THE COURT OF APPEALS, ELEVENTH DISTRICT, ASHTABULA COUNTY, OHIO

(Filed July 2, 1992)

No. 91-A-1660

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

STATE OF OHIO)
) ss.
COUNTY OF ASHTABULA)

CAROL L. HYDE,
Plaintiff-Appellant,

vs.

REYNOLDSVILLE CASKET CO., *et al.*,
Defendants-Appellees.

JUDGMENT ENTRY

For the reasons stated in the Opinion of this court, the assigment of error is without merit, and it is the judgment and order of this court that the judgment of the trial court is affirmed.

/s/ JUDITH A. CHRISTLEY
Presiding Judge for the Court

[1] Accelerated Case No. 91-A-1660

COURT OF APPEALS
ELEVENTH DISTRICT
ASHTABULA COUNTY, OHIO

CAROL L. HYDE,
Plaintiff-Appellant,

vs.

REYNOLDSVILLE CASKET CO., *et al.*,
Defendants-Appellees.

J U D G E S

HON. JUDITH A. CHRISTLEY, *P.J.*,
HON. JOSEPH E. MAHONEY, *J.*,
HON. ROBERT A. NADER, *J.*

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court Case No. 85710

JUDGMENT: Affirmed.

ATTY. DAVID J. EARDLEY
114 East Park Street
Chardon, Ohio 44024

(For Plaintiff-Appellant)

ATTY. WILLIAM E. REIDEL
134 West 46th Street
P.O. Box 278
Ashtabula, Ohio 44004

(For Defendants-Appellees)

O P I N I O N

[2] CHRISTLEY, *P.J.*

This is an accelerated calendar case, but one that requires us to consider an issue that has not been considered before by this court, nor has it been considered by the Ohio Supreme Court. Appellant, Carol L. Hyde, is appealing the Ashtabula Court of Common Pleas' judgment entry granting the motion to dismiss appellant's complaint filed by appellees, Reynoldsville Casket Co. and John Blosh.

The basic facts of this case are not in dispute. On March 5, 1984, appellant was a passenger in a motor vehicle which was involved in a collision with a truck driven by appellee John Blosh and owned by appellee Reynoldsville Casket Co. in Ashtabula County. As a result of the collision, appellant suffered substantial injuries.

On August 11, 1987, appellant filed her complaint, almost three and half years after the collision. On October 13, 1987, appellees filed their answer, and asserted as an affirmative defense that appellant's claims were barred by the statute of limitations.

On February 8, 1988, appellees filed a joint motion to dismiss pursuant to Civ. R. 12(B)(6) and R.C. 2305.10 which imposed a two-year statute of limitations for personal injury claims. The Ohio savings clause, R.C. 2305.15, became an issue in that both of appellees' addresses were in Pennsylvania. Appellee, Reynoldsville Casket Company, was [3] an out-of-state corporation without offices in Ohio, and was unlicensed as a foreign corporation to do business in Ohio. Several briefs on this matter were filed by appellant and appellees.

On July 31, 1991, the trial court issued a very well reasoned judgment entry dismissing appellant's complaint. As a result, appellant timely filed her notice of appeal. She now raises one assignment of error:

> "The trial court erred in granting Defendant's Motion to dismiss Plaintiff's Complaint."

Although appellant only raises one assignment of error, she divides this error into three separate issues. The first issue raised by appellant is that the R.C. 2305.15, the savings clause, tolls the statute of limitations as to a cause of action against an out-of-state person or corporation.

This court concedes that on its face R.C. 2305.15 is applicable to this case. It states:

> "(A) When a cause of action accrues against a person, if he is out of the state, has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, 1302.98, and 1304.29 of the Revised Code does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, absconds, or conceals himself, the time of his [4] absence of concealment shall not be computed as any part of a period within which the action must be brought." *Id.*

Nevertheless, the United States Supreme Court in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* (1988), 486 U.S. 888, 889, specifically held that R.C. 2305.15 was unconstitutional in that it violated the Commerce Clause, imposing an impermissible burden on interstate commerce under such facts. The factual scenarios of *Bendix, supra,* and the present case are too similar for us to meaningfully distinguish.

Bendix, a Delaware corporation with its principal place of business in Ohio, entered into a contract with Midwesco Enterprises, an Illinois corporation with its principal place of business in Illinois, for the delivery and installation of a boiler system at Bendix's Ohio facility. Midwesco was not registered to do business in Ohio and, as such, had not appointed an agent for service of process. Under R.C. 1703.02, Midwesco was not required to register with the State of Ohio because it only installed equipment in Ohio.

A contract dispute arose leading Bendix to file suit. Midwesco asserted Ohio's statute of limitations as a defense. Bendix relied on R.C. 2305.15, Ohio's savings clause, in its response that the limitation period had not [5] passed.

The Supreme Court held where a state denies an ordinary legal defense or privileges to out-of-state individuals or corporations engaged in commerce, that state law will be reviewed under the Commerce Clause. It is not a sufficient explanation that serving a foreign corporate defendant may be more arduous than serving a domestic corporation where a long-arm statute is available.

In finding the statute imposed a significant burden on interstate commerce, the Court noted that the Ohio statute forced a foreign corporation to choose between appointing a statutory agent and exposing itself to the general jurisdiction of Ohio courts or force it to forfeit its statute of limitations defense. *Id.* at 893.

This leaves a foreign corporation with two equally undesirable options. If a foreign corporation appoints a statutory agent, it subjects itself to Ohio's general jurisdiction, *i.e.,* the corporation could be sued in Ohio

regardless of whether the transaction in question had any connection with Ohio; or if a statutory agent is not appointed, a corporation potentially subjects itself to suit in perpetuity.

In other words, either a foreign corporation has to forego its R.C. 1703.02 exemption, submitting itself to the general jurisdiction of the Ohio courts or forego a defense [6] of the statute of limitations. "In this manner the Ohio statute imposes a greater burden on out-of-state companies than it does on Ohio companies, subjecting the activities of foreign and domestic corporations to inconsistent regulations." *Id.* at 894.

Appellees find themselves in precisely that precarious situation. As a corporation, engaged solely in interstate commerce, it is exempt from registering with the state and appointing a statutory agent pursuant to R.C. 1703.02.

Under R.C. 2305.15, the only reason appellant argues that the statute of limitations is inapplicable is that appellee, Reynoldsville Casket, was an out-of-state foreign corporation without a statutory agent in Ohio. As in *Bendix, supra*, the statute of limitations would be unattainable, thus an ordinary legal defense would be denied to appellee. Appellees are, therefore, burdened by limitless liability for lack of a statute of limitations. Domestic corporations are not so burdened. Based on the United States Supreme Court's application of the Commerce Clause, in *Bendix, supra*, R.C. 2305.15 is unconstitutional as it applies to appellee Reynoldsville Casket Co.

Additionally, this same logic is applicable to appellee John Blosh. As the trial court stated in its judgment entry, the complaint alleged that appellee John Blosh

was involved in the collision while in the scope of his [7] employment. Blosh, as an employee of Reynoldsville Casket Co., was involved in interstate commerce. Moreover, as an individual, he did not even have the option of registering with the Secretary of State. See, *Abramson v. Brownstein* (C.A. 9 1990), 897 F.2d 389; *Tesar v. Hallas* (N.D. Ohio 1990), 738 F. Supp. 240 (applying *Bendix, supra*, to individuals.) An individual engaged in interstate commerce should be afforded the same protection and defenses as a corporation.

This court would also note that there was absolutely no evidence that either appellee had absconded or attempted to avoid process. Both appellees remained at all times subject to jurisdiction under the long arm statutes, R.C. 2307.381, *et seq.* and Civ. R. 4.3.

Under such facts, and pursuant to the Commerce Clause, R.C. 2305.15 is unconstitutional.

Appellant cites numerous Ohio Supreme Court and appellate cases all predating the United States Supreme Court's ruling in *Bendix, supra*. Given the explicit ruling in *Bendix* on Ohio's savings clause, we find that precedent to be no longer binding upon this court, specifically, our district's case, *May v. Leidli* (1986), 32 Ohio App. 3d 36.

The second issue raised by appellant is that R.C. 2305.15 was deemed unconstitutional only as it applied to the specific factual situation in *Bendix supra*. There may [8] be certain applications of the statute which are constitutional, (where a defendant is beyond the reach of the long arm statute, see Justice Scalia's concurring opinion, *Bendix, supra*, at 898). The present case, however, cannot be distinguished from *Bendix*. As such, this issue is also without merit.

Finally, appellant argues that *Bendix, supra*, should only be applied prospectively, and not to the parties in this case.

The general rule in Ohio is:

> " ' * * *(A) decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that it never was the law. * * *' " *State, ex rel. Tavenner, v. Indian Lake Local School Dist. Bd. of Edn.* (1991), 62 Ohio St. 3d 88, 90, quoting *Peerless Electric Co. v. Bowers* (1955), 164 Ohio St. 209, 210.

An unconstitutional act of the general assembly is a nullity. *State, ex rel. Cline, v. Vail* (1911), 84 Ohio St. 399, paragraph one of syllabus; *State, ex rel. Bartlett, v. The Buckeye State Bldg. & Loan Co.* (1940), 67 Ohio App. 334.

Recently, the Cuyahoga County Appellate Court applied an Ohio Supreme Court decision effecting a statute of limitations retrospectively. *Obral v. Fairview General Hospital* (1983), 13 Ohio App. 3d 57. The Supreme Court in *Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St. [9] 3d 111, held, while the *Obral* case was pending, that the medical malpractice statute of limitations would commence one year after discovery overruling previous precedent stating that the statute began to run on the last date of treatment. The court of appeals held that:

> "Since *Oliver* was decided while this appeal was still pending and because no vested or contractual rights will be affected, the 'date of discovery' rule applies to this case." *Obral, supra*, at 60.

Moreover, this court does not accept appellant's argument that under *Chevron Oil Co. v. Huson* (1971), 404 U.S. 97, *Bendix* should only be applied

prospectively. *Chevron* set forth three criteria to be considered when determining whether a ruling should be considered retroactively: (1) is there a clear break with past law; (2) would retroactive application further or retard operation of the new rule; and (3) could retroactive application "produce substantial inequitable results."

In *Juzwin v. Asbestos Corp. Ltd.* (C.A. 3, 1990), 900 F. 2d 686, the court under similar facts to the present case, applied the *Chevron* factors and determined that the statute of limitations had run. Specifically, the plaintiff filed an action against an out-of-state corporation after the statute had run. The plaintiff was depending upon a New Jersey tolling statute which had been found to be [10] unconstitutional under the Commerce Clause while the case was pending. The plaintiff argued that the decision invalidating the New Jersey statute should only be applied prospectively.

The *Juzwin* court noted that the person arguing in favor of prospective application bears the burden.

Considering the first *Chevron* factor, it is clear that both in the *Juzwin* case and the present case that there is a clear break in the law. But it is also true that the constitutionality of the tolling statutes have long been questioned. See, *Title Guaranty & Surety Co. v. McAllister, Admx.* (1936), 130 Ohio St. 537; *Thompson v. Horvath* (1967), 10 Ohio St. 2d 247.

The second factor to be considered is whether retrospective application would advance or retard operation of the new rule. The *Juzwin* court held that retrospective application would bring New Jersey in conformity with the majority of other states. Therefore, it chose to implement the statute retrospectively. Likewise, the same argument applies in the present case.

Finally, the *Juzwin* court considered whether retrospective active application would produce a substantially inequitable result. Weighing the interests of both parties, the *Juzwin* court concluded that to continue to apply a different statute to out-of-state corporations [11] weighed more heavily. The same analysis is applicable to the present case.

In addition, other Ohio courts have also applied *Bendix, supra,* retrospectively. *Mark v. Mellott Mfg. Co., Inc.* (Sept. 13, 1989), Ross App. No. 1494, unreported; *Irby v. Minnetonka, Inc.* (Feb. 26, 1988), Mahoning App. No. 87 C.A. 88 unreported. In fact, this court would note that both cases followed the precedent issued by the federal appellate case, *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* (C.A. 6, 1987), 820 F.2d 186, before it was affirmed by the United States Supreme Court. Based on the above analysis, the trial court did not err in applying *Bendix* retrospectively.

Appellant's assignment of error is without merit.

The judgment of the trial court is affirmed.

/s/ JUDITH A. CHRISTLEY
Presiding Judge

MAHONEY, *J.*,
NADER, *J.*,
concur.

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

(Filed July 31, 1991)

Case No. 85710

[1] IN THE COURT OF COMMON PLEAS
ASHTABULA COUNTY, OHIO

CAROL L. HYDE,
Plaintiff,

vs.

REYNOLDSVILLE CASKET CO., *et al.*,
Defendants.

JUDGE YOST

JUDGMENT ENTRY

This cause came on for consideration of defendants' Motion to Dismiss, originally filed on February 8, 1988. The matter has been thoroughly and quite excellently briefed by counsel for plaintiff and defendants. The court has reviewed the pleadings and record herein, along with the memoranda filed in support of and contra to the Motion to Dismiss.

The facts, insofar as they are relevant to the motion, are undisputed. On March 5, 1984, the plaintiff was a passenger in a motor vehicle involved in a collision with a vehicle driven by defendant, John Blosh, and owned by defendant, Reynoldsville Casket. The collision occurred

at the intersection of State Routes 167 and 193 in Denmark Township, Ashtabula County, Ohio. Plaintiff suffered substantial injuries as a result of the collision. Plaintiff's Complaint was filed August 11, 1987, nearly three and one-half (3½) years after the collision. The statute of limitations for a cause of action of this nature is two (2) years, R.C. §2305.10. The issue to be determined by the court is the applicability and effect the Ohio Tolling Statute, R.C. §2305.15. R.C. §2305.15(A) provides:

> When a cause of action accrues against a person, if he is out of the state, has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, [2] 1302.98, and 1304.29 of the Revised Code does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, absconds, or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

Crucial to the determination of the issue is an interpretation of *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* (1988), 486 U.S. 888, 100 Lawyers Edition 2d 896. This case originated in the United States District for the Northern District of Ohio, and the decision in the Sixth Circuit Court of Appeals provided the principal basis for defendants' original motion. Since the motion in this case has been pending, the Supreme Court has affirmed the holding of the Sixth Circuit.

Bendix, supra, involved a simple contract dispute. Midwesco Enterprises installed a boiler system at a Bendix plant in Ohio. Bendix claimed that the boiler system had been installed improperly, which led to an action for breach of contract being filed by Bendix in the

District Court for the Northern District of Ohio. Bendix is a Delaware Corporation with its principal place of business in Ohio. Midwesco is an Illinois corporation with its principal place of business in Illinois. Midwesco had no corporate office in Ohio, was not registered to do business in Ohio and had not appointed an agent for service of process in Ohio.

Midwesco asserted the Ohio statute of limitations defense. Bendix responded that the statutory period had not elapsed because under Ohio law, running of the time is suspended or tolled for claims against entities that are not within the state and have not designated an agent for service of process. The court stated:

> Although statute of limitations defenses are not a fundamental right, . . . it is obvious that they are an integral part of the legal system and are relied [3] upon to project the liabilities of persons and corporations active in the commercial sphere. The State may not withdraw such defenses on conditions repugnant to the Commerce Clause. Where a State denies ordinary legal defenses or like privileges to out-of-state persons or corporations engaged in commerce, the state law will be reviewed under the Commerce Clause to determine whether the denial is discriminatory on its face or an impermissible burden on commerce. The State may not condition the exercise of the defense on the waiver or relinquishment of rights that the foreign corporation would otherwise retain. *Bendix Autolite Corporation v. Midwesco Enterprises, Inc., supra, at 893.*

The *Bendix* court reasoned that to gain the protection of the limitations period, Midwesco would have had to appoint a resident agent for service of process in Ohio and subject itself to the general jurisdiction of the Ohio courts, thus extending jurisdiction to any suit against Midwesco, whether or not

the transaction in question had any connection with Ohio. "The Ohio statutory scheme thus forces a foreign corporation to choose between exposure to the general jurisdiction of Ohio courts or forfeiture of the limitations defense, remaining subject to suit in Ohio in perpetuity." *Bendix, supra,* at 893. The court therefore found that the burden imposed on interstate commerce by the tolling statute exceeds any local interest that the state might advance.

Review of the facts and the court's reasoning in *Bendix* leads to the conclusion that the instant case cannot be meaningfully distinguished from the *Bendix* case. First, like Reynoldsville Casket, Co., Midwesco had no corporate office in Ohio, had not registered to do business here and had not appointed an agent for service of process in this state. Further, it appears that Midwesco would also have been exempt from the registration requirement pursuant to R.C. §1703.02 because it had only installed equipment in Ohio. *Bendix* appears to be directly on point with the facts of the instant case. The point of the *Bendix* desision is that under Ohio law a corporation is placed in [4] a situation in which it has a choice of either subjecting itself to the general jurisdiction of the Ohio courts by registering, or to forego the protection of the statute of limitations, thus, "forcing" registration to insure the availability of the statute of limitations defense. This burden on out-of-state entities is a violation of the Commerce Clause.

The court notes that the *Bendix* decision did not declare R.C. §2305.15 *per se* unconstitutional for all purposes. As pointed out in the concurring opinion of Justice Scalia, "[a] tolling statute that operated only against persons beyond the reach of Ohio's long-arm statute, or against all persons that could not be found for mail service, would be narrowly tailored to advance

the legitimate purpose of preserving claims; but the present statute extends the time for suit even against corporations which (like appellee) are fully suable within Ohio, and readily reachable through the mails." *Bendix, supra,* at 898. Nevertheless, the *Bendix* case did declare the statute unconstitutional as it would be applied to the facts of the present case, because the factual situtation is virtually indistinguishable from that in *Bendix.* Based upon the application of the Commerce Clause by the U.S. Supreme court, the defendant, Reynoldsville Casket Co., must prevail on its Motion to Dismiss.

The foregoing reasoning is not as clear in its application to defendant, John M. Blosh. The argument that the *Bendix* decision should also be extended to Blosh is persuasive. The Complaint alleges that Blosh was involved in the collision in the scope of his employment with Reynoldsville. Reynoldsville was engaged in interstate commerce. Thus, Blosh, as part of his employment, was engaged in interstate commerce. Blosh is faced with a more onerous choice than Reynoldsville, because Blosh could not even [5] register with the Secretary of State if he chose to do so. His home and employment are out of state. Thus, he could either remain in the State of Ohio, or return to Pennsylvania to his home and job, and essentially waive the defense of the statute of limitations allowing the claim to remain viable forever.

At least one federal court has extended the *Bendix* decision to an individual. Citing *Bendix,* the court in *Abramson v. Brownstein* (9th Cir. 1990), 897 F.2d 389, affirmed the district court's dismissal of a complaint filed against an out-of-state resident engaged in interstate commerce, when the complaint was filed past the date on which the statute of limitations had run. The

court found that the California statutory scheme forced a nonresident to choose between being present in California for several years or forfeiture of the limitations defense, remaining subject to suit in California in perpetuity. On the other hand, the state's interest in applying the tolling statute was that a defendant's physical absence impeded his availability for suit and it would be inequitable to force a claimant to pursue a defendant out of state. The *Abramson* court noted that like the defendant in *Bendix*, the defendant could have been served under the long arm statute. Since the state's interest was the same as that advanced in *Bendix*, which the *Bendix* court found could not support the burden placed on interstate commerce, the *Abramson* court found the tolling statute to be unconstitutional.

In *Tesar v. Hallas* (N.D. Ohio 1990), 738 F. Supp. ~~216~~, [240] the plaintiff filed a libel complaint against a reporter who had written an article while employed at the Plain Dealer in Cleveland, Ohio. The reporter subsequently moved out of state to take a job with a newspaper in Pennsylvania. The complaint was filed after the one year statute of [6] limitations, but the plaintiff maintained that the suit was timely because the statute of limitations was tolled by R.C. §2305.15, when the defendant moved out of state for his new job.

The *Tesar* court noted that interstate commerce is affected when persons move between states in the course of or in search for employment and that the ability of businesses to recruit out of state personnel would be adversely affected if these potential employees must forfeit statute of limitations protection. "Following *Bendix's* holding that requiring foreign corporations to submit to the general jurisdiction of Ohio courts 'is an unreasonable burden on commerce,' it seems plainly

'unreasonable' for persons who have committed acts they know might be tortiuos to be held hostage until the applicable limitations period expires." *Tesar, supra,* at 242. Because Hallas had no mechanism by which he could register with the state for service purposes, he would have had to choose between travelling out of state for his new job or enjoying the protection of the statute of limitations. Thus, the court found the tolling statute unconstitutional as the plaintiff sought to have it applied to Hallas.

If there was evidence that either of the defendants in this case had absconded, or concealed themselves for the purpose of avoiding process, or were otherwise not amenable to service of process, then the legitimate purposes of the tolling statute would be served by denying them the benefit of the statute of limitations. Both defendants remained at all times subject to jurisdiction under the long arm statutes, R.C. §2307.381, *et seq.* Civ. R. 4.3 provides the method for out-of-state service of process. Defendant, Blosh, was acting within the field and scope of his employment with defendant, [7] Reynoldsville Casket Co., at the time of the collision, and thus was engaged in interstate commerce, as much as his employer. On the facts of this case, the court holds that it is only logical that the *Bendix* decision should apply to Blosh as well as Reynoldsville.

IT IS, THEREFORE, THE ORDER AND JUDGMENT of the court that plaintiff's Motion to Dismiss the complaint is sustained.

Costs are assessed against plaintiff.

THIS IS A FINAL APPEALABLE ORDER. Within three (3) days of the entry of this judgment upon the journal, the Clerk of Courts shall serve notice in accordance with Civ. R. 5, of such entry and the date upon every party who is not in default for failure to appear and shall note the service in the appearance docket.

/S/ GARY L. YOST, *Judge*
CIV-C-18

July 31, 1991

cc: David J. Eardley
William E. Riedel

REHEARING ENTRY OF THE SUPREME COURT OF OHIO

(Dated April 6, 1994)

Case No. 92-1682

THE SUPREME COURT OF OHIO

CAROL L. HYDE,
Appellant,

v.

REYNOLDSVILLE CASKET CO., *et al.*,
Appellees.

To wit: April 6, 1994

REHEARING ENTRY

(Ashtabula County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. 91A1660).

/s/ THOMAS J. MOYER
Chief Justice

CONSTITUTIONS INVOLVED

United States Constitution—Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Ohio Constitution—Article I, Section 16

§16 [Redress in courts].

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law. (As amended September 3, 1912.)

STATUTES INVOLVED

Ohio Revised Code, Section 2305.10

TORTS

2305.10 Bodily injury or injury to personal property.

An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

For purposes of this section, a cause of action for bodily injury caused by exposure to asbestos or to chromium in any of its chemical forms arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured by the exposure, whichever date occurs first.

For purposes of this section, a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, arises upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure.

As used in this section, "agent orange," "causative agent," and "veteran" have the same meanings as in section 5903.21 of the Revised Code.

For purposes of this section, a cause of action for bodily injury which may be caused by exposure to diethylstilbestrol or other nonsteroidal synthetic estrogens, including exposure before birth, arises upon the date on which the plaintiff learns from a licensed physician that he has an injury which may be related to

such exposure, or upon the date on which by the exercise of reasonable diligence he should have become aware that he has an injury which may be related to such exposure, whichever date occurs first.

HISTORY: GC §11224-1; 112 v 237; Bureau of Code Revision, 10-1-53; 138 v H 716 (Eff 6-12-80); 139 v S 406 (Eff 8-26-82); 140 v H 72. Eff. 5-31-84.

Ohio Revised Code, Section 2305.15

SAVINGS PROVISIONS

2305.15 Saving clause.

When a cause of action accrues against a person, if he is out of state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

HISTORY: GC §11228; RS §4989; S&C 950; 51 v 57, §21; 129 v 13(177). Eff. 7-1-62.

Ohio Revised Code, Section 2305.15(A)

SAVINGS PROVISIONS

2305.15(A) Saving clause.

(A) When a cause of action accrues against a person, if he is out of the state, or has absconded, or conceals himself, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, 1302.98, and 1304.29 of the Revised Code does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, absconds, or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

HISTORY: RS §4989; S&C 950; 51 v 57, §21; GC §11228; Bureau of Code Revision, 10-1-53; 129 v 13 (177) (Eff 7-1-62); 141 v S 151. Eff. 7-9-86.